IN THE

Supreme Court of the United States

October Term, 1978

No. 77-926

GERALDINE G. CANNON,

Petitioner,

v.

THE UNIVERSITY OF CHICAGO, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Brief for Petitioner

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OPINIONS BELOW

The opinion of the court of appeals is reported at 559 F.2d 1063, 45 U.S. Law Week 2149. The opinion on rehearing appears at 559 F.2d 1077, 46 U.S. Law Week 2118. Both were set out in the Appendix to the Petition for a Writ of Certiorari. (pp. A-2, A-22).

The memorandum of decision in the district court was reported at 406 F. Supp. 1257.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1976. The opinion on rehearing of the Title IX issue presented for review in this Court was filed on August 9, 1977. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on October 3, 1977 with Chief Judge Fairchild and Judge Swygert voting to rehear the Title IX issue *en banc*. The Petition for a Writ of Certiorari was filed on December 28, 1977 and granted on July 3, 1978. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE AND REGULATION INVOLVED

Section 901, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
>
> (1) in regard to admissions to educational institutions, this section shall apply only to institutions of . . . professional education, and graduate higher education, and to public institutions of undergraduate higher education . . . ."

Section 21(b)(2), Title IX Regulations, 45 C.F.R. § 86.21(b)(2):

> "A recipient [of Federal financial assistance] shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable."

QUESTION PRESENTED

Whether section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, which prohibits discrimination on the basis of sex in education programs receiving federal financial assistance, is enforceable in a federal civil action by an individual.

STATEMENT OF THE CASE

Petitioner applied for admission to the 1975 entering class at each respondent medical school. She is an experienced surgical nurse over 30 years of age who was then completing her baccalaureate degree *cum laude*. Her academic qualifications, including college grade point average and medical college admission test scores, were higher than a substantial portion of the students subsequently admitted by each school. (App. p.3n.1, pp. 6-7).

After denial of her applications, petitioner filed administrative complaints with the Department of Health, Education and Welfare alleging that each school discriminated against women and that her application was denied at the initial screening level under a published admission policy of each school discouraging applicants over 30 years of age. Petitioner claimed this policy had a disproportionately adverse effect upon women and did not validly predict success in medical school or practice. Administrative action proved to be unavailable in fact. (App. pp. 8-16).

In the summer of 1975, petitioner commenced these civil actions. She claimed that the composition of the student body at each school reflected discrimination against women generally and requested a declaratory judgment that the particular policy under which her application was denied by each school discriminated on the basis of sex in violation of Title IX and the HEW regulations thereunder. (App. pp. 9, 13, 16-17). Reeval-

uation of her applications without regard to said policies and other remedies also were demanded. (App. pp. 17-19). Alternatively, she sought to compel administrative action by HEW or to have HEW aligned as party plaintiff in her claim, as a third party beneficiary, to enforce contractual assurances against sex discrimination given by each school to HEW in order to obtain federal financial assistance. (App. p. 5, 15-16, 19-20).

The basis for jurisdiction in the district court was that petitioner's claims are based upon federal civil rights law and that the United States is a party. (App. p. 3-4). Although each respondent school acknowledged the "receipt of federal financial assistance and its concurrent obligation to provide equality to students of both sexes" (App. p. 5; U.Chi. Mem. 8/22/15 p. 13; Nw.Mem. 9/19/75 p. 1), the complaints were dismissed for failure to state a claim upon which relief could be granted because Title IX does not authorize a private right of action. The cases were consolidated for briefing and argument on appeal. The court of appeals affirmed, holding that Title IX does not permit a private action by an individual. (App. pp. 1-2). On rehearing, the federal respondents reversed the position previously asserted and supported petitioner's claim that a private right of action should be implied under Title IX.

INTRODUCTION AND SUMMARY OF ARGUMENT

The importance of the national effort to promote equal opportunities for all persons is clear. The importance of equal access to education in that effort has been abundantly established. This case presents to the Court, as a matter of first impression, the question of whether the primary federal statute prohibiting sex discrimination in education programs receiving federal financial assistance may be enforced by private parties in the federal courts, at least where the administrative enforcement capability of HEW is inadequate or unavailable.

Appropriately, the principle embodied in the published policies of the respondent schools here at issue is at the heart of

the national effort to eliminate unreasonable sex discrimination. Exclusionary policies which utilize gender or race as express terms have been generally eliminated through federal civil rights enforcement efforts under Title IX and Title VI, respectively. When the relative academic and career patterns of men and women are examined it becomes clear that the respondent schools' admission policies could not be more calculatedly aimed at excluding women without using gender as an express term. Virtually all medical schools have comparable policies as do many other graduate and professional schools.[1] The effect of such continued sex discrimination by medical schools has been devastating in that now, over seven years after explicit congressional prohibition of sex discrimination in admissions to medical schools, even though almost 50% of college graduates and about 85% of the personnel in the health care field are women, only about 20% of entering medical students are women.[2]

In her Epilogue to the Tenth Anniversary Edition of "the book that started it all," THE FEMININE MYSTIQUE, (W.W.

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[1] According to data published by the Association of American Medical Colleges applicants to U.S. medical schools adversely affected by policies discriminating against persons over a specified age, ranging generally from 27 to 30, numbered about 4,000 in 1974 alone. To this must be added otherwise qualified potential applicants who were deterred by the chilling effect of such published policies. Petitioner alleged that such persons are disproportionately female and profferred statistical data to support that claim. The basic explanation is simple. Many women interrupt their education to marry and raise children before completing graduate or professional education. For example, the percentage of students for whom the lapse of time from receipt of a baccalaureate degree to the commencement of graduate study is 10 years or more is 2½ times as great for women as for men. Marriage and children are the reasons most often cited by women for the interruption of education but rarely cited by men.

[2] Section 799A, Public Health Service Act, 42 U.S.C. § 295h-9 was enacted in 1971. Title IX was enacted the following year. Shelton & Berndt, "Sex Discrimination in Vocational Education: Title IX and Other Remedies," 62 *Calif. L. Rev.* 1141 (1974).

Norton & Co., New York, 1963, 1974) Betty Friedan reported application of a similar "age" policy by the department of Psychology at Columbia University as an incident which led to formation of the National Organization for Women. Sociological and statistical support for the significance and importance of petitioner's claim has been well documented. See *e.g.* WALSH, DOCTORS WANTED, NO WOMEN NEED APPLY, (Yale Univ. Press 1977); HARRIS, THE PRIME OF MS. AMERICA, (G. P. Putnam's Sons, New York, 1975); and ASTIN, THE WOMAN DOCTORATE IN AMERICA, (Russell Sage Foundation, New York 1969).

Title IX creates an individual private right of action to remedy such discrimination and the applicable HEW regulation, 45 C.F.R. § 86.21(b)(2), provides explicit guidance for evaluation of the admission policy in question.[3] Title IX was patterned precisely after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* When Title IX was enacted the courts already had held that a private right of action existed under Title VI. Congress intended Title IX to have enforcement rights identical to its predecessor legislation, Title VI. Substantial legislative history demonstrates that congressional intent.

Congressional intent to permit a private right of action under Title IX has been affirmed by at least three subsequent declarations of Congress. First, legislative history of the 1974 amendment of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, expressly stated that both Title VI and Title IX "permit a judicial remedy through a private action." Second, legislative history of the Age Discrimination Act of 1975, 42

[3] Support for the merits of petitioner's age discrimination claim on equal protection and due process principles, apart from the disparate impact on women, may be found in THE AGE DISCRIMINATION STUDY, *A Report of the United States Commission on Civil Rights* (December, 1977) *N.B.* Findings Nos. 2, (p.24), 18 (p.76), Conclusion (pp. 78-81) and Recommendation No. 12 (p.101).

U.S.C. § 6101 *et seq.*, again expressly confirmed the congressional view that legislation patterned on Title VI provides a private right of action requiring an express negation when not applicable. Third, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, allows awards of attorneys fees to successful private plaintiffs specifically in Title IX actions. The legislative history of that Act as well as the statutory provision itself expressly reflected congressional intent to encourage individual private actions under Title IX. This Court consistently has held that such subsequent declarations and acts of Congress must be given great weight and may be virtually conclusive in construing an earlier statute.

Precedents for a private right of action under Title VI cannot be distinguished. Plaintiff has stated a claim under Title IX, and her complaints may not be dismissed on the basis of a defendant's unproven assertions.

ARGUMENT

1. Title IX was patterned on Title VI and substantial legislative history confirms a private right of action.

The question of private enforceability of section 901 of Title IX relates directly to the enforceability of two other federal laws which are worded identically, namely section 601 of Title VI which prohibits discrimination on the ground of race, color or national origin in any program receiving federal financial assistance, and section 504 of the Rehabilitation Act of 1973, which prohibits discrimination in such programs solely by reason of a handicap.[4] Title IX was patterned on Title VI, and

[4] While the decision on rehearing was pending, another panel of the Seventh Circuit in *Lloyd* v. *RTA*, 548 F.2d 1277 (7th Cir. 1977) held that section 504 was enforceable against defendants to whom 42 U.S.C. § 1983 did not apply. On rehearing, the court below distinguished *Lloyd* on the ground that Congress provided no remedy at all for section 504, overlooking the finding in *Lloyd* that the legislative history expressly contemplated administrative regulations and enforcement comparable to Title VI and Title IX. Cf. 559 F.2d at 1082 (Pet. Cert. p. A-32) and 548 F.2d at 1281-82 n.15, 1285. The

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section 504 in turn was patterned on Title VI and Title IX. These laws differ only in the types of discrimination and programs covered by each. The HEW regulation for evaluation of admission policies having the disproportionate impact claimed by petitioner is squarely applicable. 45 C.F.R. § 86.21(b)(2)

The identity of the legislative scheme in Title VI and Title IX was obvious and deliberate. Legislative history is replete with reference to such identity. Representative O'Hara later explained that Title IX was so patterned after Title VI that in its initial House consideration the bill was prepared "from a retyped, slightly altered Xerox copy" of Title VI. He declared: "Now, you tell me a clearer case of a Congress intending to do exactly the same thing with one law as they did with another." *Hearings on H. Con. Res. 330 before the Subcommittee on Equal Opportunities of the House Committee on Education and Labor,* 94th Congress, 1st Session, at 16 (1975).

Well established doctrine of course required that legislators and draftsmen, noting the more than fifty decisions reported under Title VI prior to the enactment of Title IX in 1972 where violation of both the Constitution and the statute was charged, to conclude that the courts acted under the statute whenever the statute and guidelines were dispositive. See Annotations, 42 U.S.C.A. § 2000d *et seq.*

Between the enactment of Title VI in 1964 and Title IX in 1972, courts of appeals for at least three circuits expressly had construed Title VI to create a private cause of action. No contrary construction has been found.

Bossier Parish School Board v. *Lemon,* 370 F.2d 847 (5th Cir. 1967), *cert. denied,* 388 U.S. 911 (1967), left no doubt that

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enforcement provisions of the HEW regulations for both Title IX and section 504 are identical. Both simply incorporate by reference the enforcement provisions for Title VI. 45 C.F.R. § 84.61 and 45 C.F.R. § 86.71.

Title VI's language allowed a private right of action in circumstances where section 1983 and the Constitution could not apply directly. *Bossier* was so understood by HEW. (Opinion dated 9/17/74, Pet. Cert. pp A-36).

In *Kelley* v. *Altheimer, Arkansas Pub. School Dist. No. 22,* 378 F.2d 483, 492 (8th Cir. 1967), the court stated, "Regardless of the steps which may be taken by HEW to secure compliance, we will not avoid our responsibility in the matter."

Cypress v. *Newport News Gen'l and Nonsect. Hosp. Assoc.,* 375 F.2d 648, 660 (4th Cir. 1967), held;

> "One is not yet in a position to predict with confidence when, if at all, the HEW carrot will have its hoped for effect. In the meantime, it would be fatuous for courts to abstain where the right to relief has been abundantly proved."

Subsequent to the enactment of Title IX, Congress, in three separate instances, confirmed its understanding that section 901 is privately enforceable. The prior construction of Title VI applies to Title IX. See *Armstrong Co.* v. *Nu-Enamel Corp.,* 305 U.S. 315 (1938); *Overstreet* v. *North Shore Corp.,* 318 U.S. 125 (1943); *United States* v. *Dixon,* 347 U.S. 381 (1954).

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, authorizes the award of attorney's fees in any action to enforce specified civil rights laws, including Title VI and Title IX. Virtually every congressman who spoke on the attorney's fees act strongly reflected the understanding that Title VI and Title IX were enforceable in private actions.[5] That

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[5] See: 122 Cong. Rec. (daily ed. Sept. 21, 1976) S.16251 report of Sen. H. Scott and S.16252 report of Sen. Kennedy and (daily ed. Oct. 1, 1976) H.12159 report of Rep. Drinan. See also: 122 Cong. Rec. (daily ed. Sept. 21, 1976) S.16262 remarks of Sen. Allen, (daily ed. Sept. 22, 1976) S.16431 remarks of Sen. Hathaway, (daily ed. Sept. 29, 1976) S.17051 remarks of Sen. Tunney, S.17052 remarks of Sen. Abourezk, (daily ed. Oct. 1, 1976) H.12152 *et seq.* colloquy

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Act confirmed the earlier congressional declarations that Title VI and Title IX "permit a judicial remedy through a private action," made in connection with amendment of the Rehabilitation Act of 1973, 1974 U.S. Code Cong. and Adm. News 6390-91, and that, absent *express* negation, legislation patterned on Title VI contemplated "a private right to such a remedy through civil suit," made in connection with the Age Discrimination Act, 1975 U.S. Code Cong. and Adm. News 1324. Such congressional declarations of the private enforceability of Title VI and Title IX followed this Court's statement of the enforceability of Title VI in *Lau* v. *Nichols*, 414 U.S. 563 (1974). That Congress intended Title IX to be enforceable in the same manner as Title VI is clear beyond question.

This Court has held that such subsequent declarations by Congress must be given "great weight" and may be "virtually conclusive." *New York, Phila. & Norfolk R.R.* v. *Peninsula Produce Exchange*, 240 U.S. 34, 39 (1916); *Sioux Tribe* v. *United States*, 316 U.S. 317, 329-30 (1942).

As stated in *Brown* v. *General Services Administration*, 425 U.S. 820, 828 (1976),

> "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was."

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among Reps. Quie, Drinan, Anderson and Bauman. H.12161 remarks of Rep. Railsback, H.12165 remarks of Rep. Sieberling and H.12164 remarks of Rep. Holzman.

The opinion on rehearing concluded that Title IX was specified in the act "merely to provide for the possibility that some court might deem it appropriate in the future to imply a private right of action from the provisions of Title IX." 559 F.2d at 1080 (Pet. Cert. p.A-27) However, that construction presumes inclusion of Title VI and Title IX in the act either invited judicial interpretation contrary to the intent of Congress or is a nullity. At the very least the attorney's fees act demonstrates that a private right of action under Title VI or Title IX would not conflict with congressional intent. Such asserted conflict, however, was the basis for the denial of such a right of action in the decision below.

The Senate Report on the attorney's fees act stated, "These fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation while at the same time limiting the growth of the enforcement bureaucracy." 1976 U.S. Code Cong. and Adm. News 5911. This matter provides an apt illustration. On June 2, 1976, 15 months after filing, the regional office of HEW advised petitioner that her claims present issues "of first impression and national in scope." (Pet. Cert. p. A-35). She has received no further communication on her administrative complaints. While HEW has recognized a responsibility to investigate individual complaints, it is not capable of fully processing each individual complaint with its available staff and funding.[6]

The Title IX regulations, like the Title VI regulations, permit participation by an individual complainant at the discretion of HEW but they do not afford the individual any right to participate. Termination of federal assistance, without more, provides punishment of an offending recipient instead of a remedy to an aggrieved individual. Specific enforcement of contractual assurances against discrimination is a far more appropriate remedy for valid individual complaints. The position of HEW on rehearing and in this Court, supporting a private right of action under Title IX, accords with the long-standing opinion of departmental counsel dated September 17, 1974, a copy of which is set out in the Appendix to Petition for Certiorari. (p. A-36).[7]

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[6] See *Rosado* v. *Wyman*, 397 U.S. 397 (1970), *Allen* v. *State Board of Elections*, 393 U.S. 544, 556 (1969). HEW Secretary Mathews confirmed that "current and projected staff resources will still be inadequate simultaneously to eliminate the complaint backlog, to resolve all incoming complaints on a timely basis, and to fulfill other essential enforcement responsibilities." 41 Fed. Reg. 18394 (1976).

[7] Senator Birch Bayh, one of the principal congressional sponsors of Title IX, and Nels Ackerson, legislative assistant to the Senator, were of counsel on the brief for petitioner on rehearing in the Seventh Circuit. A more extensive review of legislative history and authorities cited in the foregoing argument may be found in said brief.

2. The decision below conflicts with applicable decisions of this Court pertaining to discrimination on the basis of race, color or national origin, and related issues.

Denial of a private right of action in the circumstances of this case conflicts with applicable decisions of this Court in three respects.

First, in *Lau* v. *Nichols*, 414 U.S. 563 (1974), this Court recognized the private enforceability of Title VI as follows:

> "We do not reach the Equal Protection Clause argument which has been advanced but rely solely on § 601 [of Title VI] to reverse the Court of Appeals." 414 U.S. at 566.

In separate concurring opinions Mr. Justice Blackmun referred to enforcement of "the statute and the guidelines," 414 U.S. at 572, and Mr. Justice Stewart noted the absence of challenge to plaintiffs' right to enforce Title VI assurances in the defendants' federal funding contract as third party beneficiaries, 414 U.S. at 571 n, 2.[8]

The decision below distinguished *Lau* with the unprecedented ruling that federal courts may imply jurisdiction under Title VI or Title IX for actions by "large groups" claiming race or sex based discrimination but not for individual actions.[9] Such distinction, however, fails to recognize that a suit for violation of Title VI or Title IX is necessarily in the nature of a class action: the evil sought to be ended is discrimination on the basis

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[8] *See: Euresti* v. *Stenner*, 458 F.2d 1115 (10th Cir. 1972); *Poirrier* v. *St. James Parish Police Jury*, 372 F.Supp. 1021 (E.D.La. 1974). To the extent state law controls the third party beneficiary issue, *Miree* v. *DeKalb County Georgia*, 433 U.S. 25 (1977), Illinois law clearly permits enforcement of contract by third party beneficiaries. *Illinois Law and Practice*, Vol. 12, p. 443, Contracts, § 265 (West Pub. Co.)

[9] 559 F.2d at 1072, 1074 N. 16, 1083. (Pet. Cert. pp. A-12, A-16 N. 16, A-33).

of a class characteristic, *i.e.* race, color, national origin or sex. The distinction also overlooks the central role of *stare decisis* in our legal system. By so limiting access to the courts, it runs contrary to American tradition that civil rights are basically individual rights.

Recently, in *Regents of the University of California* v. *Bakke*, No. 76-811, four Justices expressly based their decision on the enforceability of Title VI. Four others expressly assumed Title VI was enforceable. Such action would have little meaning in that suit by an individual if the decision below had correctly distinguished *Lau* as being dependent upon the large number of plaintiffs. Such action by this Court also rejects the alternative distinction asserted in the decision below that *Lau* and other decisions of lower federal courts which involved both constitutional and statutory claims under Title VI, were decided under the Constitution. Exactly the opposite conclusion, namely that to the extent of any difference such cases were decided under the statute and the guidelines, accords with such action by this Court in *Bakke* and the well established policy of deciding cases on non-constitutional grounds if possible.

Second, the decision below conflicts with the decision of this Court in *Cort* v. *Ash*, 422 U.S. 66 (1974). That decision articulated four factors pertinent to implying a private cause of action under a federal statute which does not expressly provide such a remedy.[10]

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[10] Historically discriminatory state action has been remedied by the federal judiciary under the authorization of section 1983 and discriminatory federal action under implied authorization. *Brown* v. *Board of Education*, 347 U.S. 497 (1954), *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). *See* the analysis of *Cort* offered with suggestion for clarifying emphasis in this case in Note, "Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View," 87 *Yale L. J.* 1378 (1978). *See also* Note, "Private Rights of Action Under Title IX," *13 Harv. C.R.-C.L. L. Rev. (1978)* (in press). Section 1983 is not a jurisdictional statute and it has no counterpart expressly authorizing private suits to remedy discriminatory federal action.

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With respect to the most pertinent factor of whether there is an indication of legislative intent to permit or deny such a remedy, *Cort* stated that where federal law has granted a class of persons certain rights—as do both Title VI and Title IX by utilizing the language "No person in the United States shall . . . be excluded"—it is not necessary to create a private cause of action, although an explicit purpose to deny such a cause of action would be controlling.[11] 422 U.S. at 82. No purpose to deny a cause of action is evident in either Title VI or Title IX except with respect to the last resort remedy of administrative fund cutoff. Any such purpose would preclude the courts from deciding cases under Title VI or Title IX where federal jurisdiction had been claimed on some other basis such as "state action" under 42 U.S.C. § 1983, because Congress applied the same policy in the same words to both state and private recipients of federal financial assistance in both statutes. Yet the court of appeals on rehearing adopted such an alternative distinction for *Lau* and the multitude of other decisions which permitted private actions under Title VI.[12]

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Blue v. *Craig*, 505 F.2d 830 (4th Cir. 1974). Authorization in the case of federal action is implicit. Mere provision for some administrative procedure to implement congressional policy generally has not been held to evidence an intention to preclude a judicial remedy. Administrative enforcement also is available in the situations where a judicial remedy has been most frequently implied. Note, "Implying Civil Remedies from Federal Regulatory Statutes," 77 *Harv. L. Rev.* 285 (1963).

[11] In *Bakke*, Mr. Justice Stevens joined by The Chief Justice, Mr. Justice Stewart and Mr. Justice Rehnquist found it, "clear that Congress had no intention to foreclose a private right of action," n.28. Mr. Justice White disagreed. Mr. Justice Powell, with whom Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Blackmun concurred in this respect, did not address this "difficult issue" and assumed only for purposes of that case that an individual has a right of action under Title VI. (Part II A.).

[12] 559 F.2d at 1083 (Pet. Cert. p. A-33-34). See annotations for Title VI, 42 U.S.C.A. § 2000d *et seq.* Analytically, the distinctions of

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The identical legislative scheme cannot mean one thing in the case of a state program and something else in the case of other programs.[13] Congress applied the same policy and the same administrative procedures to *any* program receiving federal financial assistance. To conclude that Title VI meant to limit individual actions already expressly authorized under section 1983 would turn that historic legislation on its head by using Title VI to limit section 1983. It would convert what Congress intended as a charter for liberty into further shackles for the victims of discrimination.[14] It would mock the Presidential

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Lau on constitutional and state action grounds are the same because 42 U.S.C. § 1983 by its terms requires violation of civil rights afforded by the Constitution and laws of the United States. If judicial enforcement of Title VI or Title IX would conflict with the intent of Congress, such laws could not trigger the operation of section 1983, thus leaving only the constitutional argument. This Court, however, expressly declined to reach the Equal Protection Clause argument in *Lau* and relied solely on section 601, the statute and its guidelines or third party beneficiary enforcement of the Title VI assurances in defendants' federal funding contract. All apply in this case.

[13] For medical schools, among others, the amount of federal assistance may be substantially greater in the latter case.

[14] The extended colloquy among Sens. Stennis, Humphrey, Case and Keating clearly established that any such construction must be avoided. 110 Cong. Rec. 5224—5662 (1964). In *U.S.* v. *Frazer*, 317 F.Supp. 1079, 1083 (M.D. Ala. 1970), Chief Judge Frank M. Johnson, Jr. set out a ringing affirmation of their success. Sen. Case's point that the limitations on administrative action in section 602 do not limit the express application of the policy of section 601 to *any* program receiving federal assistance was later reflected in the removal of guaranty assistance from the draft section 602 then under discussion to a new and separate section 605 applicable to the full title. The elaborate safeguards of section 2 were directed to the potential for "dictatorial" abuse of the *administrative* fund cutoff authorization. By their terms, they do not apply to enforcement "by any other means"—even by the agency.

statements offered in support of Title VI:

> "Wherever Federal funds are expended for anything, I do not see how any American can justify—legally, or logically, or morally—a discrimination in the expenditure of those funds as among our citizens."
>
> President Dwight D. Eisenhower[15]

> "I don't think we should extend Federal programs in a way which encourages or really permits discrimination. That is very clear."
>
> President John F. Kennedy[16]

The manifest intent of Title VI was to extend civil rights enforcement. Express authorization in Titles II and VII for a private action against privately owned public accommodations and private employers which do not receive any federal, state or local financial assistance, while exempting *any* program receiving federal financial assistance in Title VI, would have been an outrage in the situation sense of the Civil Rights Act of 1964.[17] To infer it *sub silentio* is unthinkable.

The three other factors specified in *Cort* all confirm that a private right of action should be implied: petitioner is within the

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[15] Quoted by Sen. Kuchel, 110 Cong. Rec. 6561.

[16] Quoted by Sen. Pastore, 110 Cong. Rec. 7067.

[17] Ironically, isolated remarks by Sens. Kuchel and Keating and Cong. Gill, 110 Cong. Rec. 7065, 6562 and 2467, respectively, considered out of the context of the debates, could appear to support argument against a private right of action. Actually, such remarks were directed to the fund cutoff remedy as a parry to claims by opponents that Title VI was unnecessary. *See eg.* remarks of Sen. Talmadge. "The people have the authority to go to court, and the Senator admits that they have that right." 110 Cong. Rec. 5254. All such remarks of both the proponents and the opponents thus confirm a private right of action except with respect to the "last resort" of *administrative* fund cutoff which was perceived as open to "dictatorial" abuse. That Congress intended Title VI *first* to end discrimination in federally assisted programs and only as a *last resort* to cut off funds to the recalcitrant was repeatedly emphasized in the debates in both houses.

class for whose *especial* benefit Title IX was enacted; the federal respondents have confirmed that her private action would not conflict with their administrative efforts but instead provide appropriate support; and civil rights have not been traditionally relegated to state law.

Finally, the decision below conflicts with the decision of this Court in *Conley* v. *Gibson,* 355 U.S. 41 (1957), that "a complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46. Specifically, the court of appeals, in conflict with *Conley:*

> (i) adopted one respondent school's vague and unproven suggestion that admission of petitioner would require discrimination against better qualified applicants[18] instead of petitioner's verified allegation, based upon data published by the school, that she had higher academic qualifications than a substantial number of its accepted students;[19]
>
> (ii) overlooked petitioner's claim that she is within a large class of women against whom respondents discriminate on the basis of sex;

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[18] Such suggestion was made only on behalf of the Univ. of Chicago respondents. The Northwestern respondents had acknowledged in writing that their age policy was involved in denial of petitioner's application. (App.p.10). The credentials statement noted in the complaint (App.p.10) was in a printed form letter. The age limit note was handwritten on the form letter.

[19] (App. pp 6-7). Based upon the data cited in the complaint and the median GPA of 3.55 and average MCAT of 620 for accepted students published for the U. Chi. medical school in "Medical School Admission Requirements 1975-76," Association of American Medical Colleges, petitioner estimated that her grade point average at the time of application and her medical college admission test scores were higher than at least 25% of the students accepted by the school and that her final grade point average was higher than at least 50% of the accepted students at that school.

(iii) rejected petitioner's claim under 42 U.S.C. § 1983 that, in order to obtain state assistance,[20] both respondent schools preferred Illinois residents contrary to what school administrators would decide on the basis of academic policy on the ground that facts cited by petitioner to evidence such policy "may be" related to other factors[21], and

(iv) initially held, without explanation, that delay of "about one year" in administrative action by HEW on petitioner's Title IX claim was not unreasonable and, on rehearing, after such delay had exceeded 2½ years and

[20] Petitioner claimed that each medical school is operated predominately from governmental funds. The U. Chi. medical school admitted direct state aid amounting to more than $9,600 per Illinois student per year. Tuition and fees were less than $3,300 at that time. The $400 per graduate discussed by Judge Friendly in *Grafton* v. *Brooklyn Law School*, 478 F.2d 1137, 1142 (2d Cir. 1973), as adequate state involvement to invoke section 1983 in the case of a discriminatory admissions policy, pales into insignificance by comparison. Federal financial assistance creating Title IX obligations was acknowledged by both schools but the amount was not disclosed. Federal assistance is subject to state control under the Public Health Service Act. See *Simkins* v. *Moses H. Cone Memorial Hosp.*, 323 F.2d 959, 966-69 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964) which was repeatedly noted with approval in the Title VI debates.

[21] 559 F.2d at 1069n.7. (Pet. Cert. p. A-6n. 7). *Cf.* 559 F.2d at 1072n.9, 1083. (Pet. Cert. pp. A-11n.9, A-33-34). Under *Conley* the court was required to determine that the preference "must be" related to such other factors and "could not be" related to the state action as claimed by petitioner. It did not and could not do so on the Record. Petitioner's § 1983 claims included violation of the Equal Protection Clause as well as Title IX. Moreover, to the extent that some form of pendant enforcement of Title VI or Title IX might be permitted even *if* inconsistent with the legislative scheme, it also should be noted that the defendant schools in answering the petition for rehearing, admitted that the procedural basis on which the Seventh Circuit ultimately resolved petitioner's claim under the Age Discrimination in Employment Act, 29 U.S.C. § 626(c), was simply wrong on the facts. (*Cf. 559 F.2d at 1076-77*, Pet. Cert. p. A-19 and R. Jt.Ans. 9/27/76 p.10).

HEW had supported petitioner, claimed that administrative enforcement of Title IX had not been "given an opportunity to work".[22]

Thus, the court of appeals decided the important question of women's rights under federal law presented by this case in conflict with applicable decisions of this Court in *Lau, Cort* and *Conley*.

By denying to women seeking enforcement of rights secured by Title IX the same procedure afforded by the decisions of this Court in *Lau* and *Bakke* for rights secured by Title VI, the decision below rejected the substantial legislative history and obvious identity of language that compel similar interpretation. The distinction of *Lau* on the basis of the number of plaintiffs is unprecedented and contrary to American legal tradition. The alternative distinction on state action and constitutional grounds fails to account for Congress' adoption of the same policy for all specified programs receiving federal financial assistance, state or private, and the pointed reliance by this Court in *Lau* on the statute and the guidelines or the related federal funding contract instead of the Equal Protection Clause. All three apply in this case.

From a policy viewpoint, litigation involving Equal Protection Clause arguments related to more specific Title VI or Title IX guidelines in the case of state schools and programs certainly should be resolved short of the constitutional grounds, as in

[22] 559 F.2d at 1077, 1082. (Pet. Cert. pp. A-20, A-32). Lack of prompt outside enforcement by HEW and the courts cannot help but tempt recipients to delay the institution of meaningful internal procedures to resolve claims of discrimination, thereby increasing the substantial HEW administrative backlog and creating constitutional litigation for the courts on matters which could be resolved under the statute and regulations as in *Lau*. More importantly, neglect of prompt enforcement, for whatever reason, permits continued federal subsidy of discrimination in defiance of national policy. There is no reason to anticipate that difficult, multitudinous or frivolous litigation will be peculiar to Title IX.

Lau. There is no reason for the federal courts to embark on complicated determinations of whether applicable HEW regulations, which undoubtedly will become more specific with experience, are *required* by the Constitution. Cases such as *Bakke* are peculiar in this respect and illustrate the point. Yet the legislative scheme urged in the courts below would require precisely such difficult constitutional judgments in all such cases. Determination of whether the guidelines comport with the statutes certainly is a preferable standard from the standpoint of judicial economy let alone the basic national policy of the civil rights statutes themselves.

3. Alternatively, denial of the administrative relief sought against HEW was incorrect.

It is fundamental that the meaning of unreasonable delay or withholding of administrative action under the Administrative Procedures Act, 5 U.S.C. § 706, is related directly to the exclusive or supplemental nature of the remedy provided by the administrative action sought. If there is no private right of action against the schools under Title IX, there must be recourse against HEW for the exclusive remedy it must provide thereunder. In dismissing HEW *sua sponte*, the district court noted that prompt administrative action had been scheduled for "the first half of January, 1976." (App. p. 49).

Petitioner continues to await agency action after more than three years. Cervantes observed that a traveler on "the road of by and by" soon finds "the land of never".

CONCLUSION

For the foregoing reasons, the judgment and opinion of the United States Court of Appeals for the Seventh Circuit should be reversed and each action remanded to the United States District Court for the Northern District of Illinois with instructions to reach the merits.

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